
AMERICAN LEGISLATIVE EXCHANGE COUNCIL

A National Association for America's State Legislators ♦ Jeffersonian Principles in Action!

Prepared Statement

Of

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United States House of Representatives
Committee on Agriculture
September 7, 2005

Introduction

Good morning Chairman Goodlatte, Ranking Member Peterson and Members of the Committee:

My name is Bill Howell, I am Speaker of the Virginia House of Delegates and a member of the Board of Directors of the American Legislative Exchange Council.

The American Legislative Exchange Council (ALEC) is the nation's largest bipartisan, individual membership organization of state legislators with over 2,400 legislator members from all fifty states and 97 members in the Congress. It is my pleasure to appear before you to present testimony regarding HR 3405 and eminent domain issues.

Kelo v. New London

The Supreme Court's decision in *Kelo v. New London* was very disappointing to those of us who believe in the value of private property. The Fifth Amendment states that "private property [shall not] be taken for public use, without just compensation." By expansively defining "public use" to mean any legislative purpose that is legitimate and not irrational,¹ the Supreme Court has effectively written the "public use" limitation out of the Fifth Amendment. As Justice O'Connor eloquently wrote in her dissent:

Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded--i.e., given to an owner who will use it in a way that the legislature deems more beneficial to the public -- in the process. To reason, as the Court does, that the incidental public benefits resulting from the subsequent ordinary use of private property render economic development takings "for public use" is to wash out any distinction between private and public use of property -- and thereby effectively to delete the words "for public use" from the Takings Clause of the Fifth Amendment.²

The Supreme Court could have limited the definition of "public use" instead of defining "public use" to mean anything "rationally related to a conceivable public purpose."³ For example, the Supreme Court could have limited "public use" to public ownership and control by the state, a unit of local government, a school district. Or the Supreme Court could have limited "public use" to uses that are the more traditional functions of government such as construction or maintenance of public buildings, roads, schools, hospitals, railroads, reservoirs, or utilities.

While the Supreme Court failed to protect private property rights, they acknowledged the proper role of the states. The Court stated, "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power."⁴ The American Legislative

¹ See *Kelo v. New London*, 125 S.Ct. 2655, 2667 (2005).

² *Id.* at 2671.

³ *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 241 (2005).

⁴ *Kelo*. at 2668.

Exchange Council applauds the Supreme Court for recognizing that states have the authority to further protect private property rights in the states.

As a result of the *Kelo* decision, many states are acting to better protect private property rights. Alabama and Texas have passed laws that will help limit eminent domain abuse and dozens of states will take up legislation to protect their citizens from eminent domain abuse once the new legislative sessions start in January. It is heartening to see that when one branch of government fails to protect the rights of citizens, another level of government can step in to help protect important rights.

Federal Role in the Protection of Private Property Rights

Without doubt, the most important function of government at any level is to protect the lives, liberty, and property of its citizens. This was a fundamental reason for the adoption of the Constitution and should remain a fundamental purpose of government today.

The Federal government was created to play a special role in the protection of Americans. It protects Americans from foreign threats and helps state and local police forces protect Americans against criminals inside the country. The Federal government is also empowered to protect Americans from overzealous state and local governments.

The Founding Fathers realized that checks and balances were needed to restrain the excesses of overzealous government. As James Madison explained in Federalist 51:

In the compound republic of America, the power surrendered by the people is first divided between two distinct governments [the state and federal governments], and then the portion allotted to each subdivided among distinct and separate departments [the executive, legislative, and judicial]. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.

These distinct levels of governments and divisions within state and federal government allow for multiple opportunities to protect the rights of the people. With eminent domain, (and the recent Supreme Court decision in *Kelo v. New London*), the Supreme Court has not adequately protected individual property rights. In light of this decision, states around the country are moving to protect property rights. However, there remains a federal role in providing increased protection for the people.

HR 3405, Strengthening the Ownership of Private Property (STOPP) Act

The goal of the STOPP Act is commendable in that it seeks to restrict federal money from being spent on projects that use eminent domain to take property from one private party and transfer it to another private party. There is no reason the Federal government should engage or promote

such transfers. States and local governments may have the prerogative to conduct such transfers, but the Federal government should not encourage and finance them.

Congress has broad authority under its spending power to provide for the “general welfare of the United States.” U.S. Const. Art. I § 8 cl. 1. As the Supreme Court held in *South Dakota v. Dole*, 483 U.S. 203 (1987), states have the power to attach conditions to the receipt of federal funds. The STOPP Act does not regulate state and local governments’ eminent domain authority, it merely conditions the receipt of federal funds on states not abusing eminent domain authority. This is well within Congress’ powers and is laudable because it helps protect the rights of private citizens from the excesses of state and local governments.

American Legislative Exchange Council Resolution on Eminent Domain

Last month, the American Legislative Exchange Council (ALEC) approved a resolution on eminent domain. The state legislators felt it was important to make a strong statement against eminent domain abuse. As noted earlier, in the *Kelo* decision, the Supreme Court stated, “nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power.” ALEC’s resolution calls for state and federal governments to protect private property rights against unreasonable use of eminent domain. In addition, it calls on each state to enact protections to protect private property. ALEC does not support the taking of property from private parties and transferring it to other private parties as part of economic development schemes. This is antithetical to our country’s foundational principles. As James Madison stated, “Government is instituted to protect property of every sort; as well that which lies in the various rights of individuals, as that which the term particularly expresses. This being the end of government, which impartially secures to every man, whatever is his own.”

Eminent domain in Virginia

In Virginia we will examine curbing eminent domain abuse in two ways. The first task for the General Assembly is to define “public uses.” Article I, § 11 of the Constitution of Virginia states:

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation, the term “public uses” to be defined by the General Assembly.

The General Assembly will take a hard look at what should be considered a “public use.” While some may decide that a transfer of property through eminent domain from one private party to another is an appropriate “public use,” I disagree.

Upon defining “public uses,” we will seek to enshrine a definition of “public use” in the Commonwealth’s Constitution. Of course, this will take time, but it is critical to better protect the private property rights of the citizens of the Commonwealth.

Conclusion

The members of ALEC, at both the state and federal levels, share a common commitment to the Jeffersonian principles of individual liberty, limited government, and free markets. Thomas Jefferson wrote on April 6, 1816 that the protection of private property rights is “the first principle of association, the guarantee to everyone of a free exercise of his industry, and the fruits acquired by it.” He also stated that “The true foundation of republican government is the equal right of every citizen in his person and property and in their management.”⁵

As Thomas Jefferson understood, although some politicians at the local level have forgotten, “Nothing is ours, which another may deprive us of.”⁶ The fight to protect individual property rights needs to happen at every level of government. In Virginia we will closely examine this issue in the upcoming legislative session. In other states, state legislators will work hard to curb the potential for eminent domain abuses in their states. We thank the Committee for holding this hearing and urge Congress to continue its efforts in fighting the abuses of eminent domain.

Chairman Goodlatte, Representative Peterson, Members of the Committee, I am honored to testify here. ALEC and I look forward to working with you in the days and months ahead to curb eminent domain abuse and protect private property rights.

Thank you. I would be pleased to answer any questions you might have.

⁵ Thomas Jefferson to Samuel Kercheval (1816).

⁶ Thomas Jefferson to Maria Cosway (1786).